

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: Guidant Corp. Implantable Defibrillators
Products Liability Litigation

MDL No. 05-1708 (DWF/AJB)

This Document Relates to All Actions

PRETRIAL ORDER NO. 5

On January 24, 2006, the Court held its second Status Conference in order to address case management issues presented to the Court by the parties, as well as to obtain an update on all matters—disputed and undisputed—before the Court.

During the course of the Status Conference, the parties addressed the agenda items set forth on a Joint Agenda that was submitted to the Court prior to the Status Conference. Consequently, the Court addressed various issues, including, but not limited to, the status of state court actions, discovery, the selection process for trials and trial dates, class action issues, and other issues that promote the fair and efficient administration of this MDL.

The parties have submitted additional proposals since the last Status Conference, together with opposing submittals and views on how to proceed in the above-entitled matter. Having reviewed the contents of the file, the submissions of all of the parties, and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

ORDER

1. Except to the extent modified herein, all existing case management orders of this Court shall remain in full force and effect.
2. Plaintiffs' Lead Counsel Committee shall identify by February 10, 2006, the representative or so-called bellwether cases to be tried in March 2007.

3. Defendants' Lead Counsel Committee shall respond to Plaintiffs' list of representative and bellwether cases, in addition to proposing their own, if there is no agreement by February 17, 2006.

4. The Court will then identify representative and bellwether cases by February 27, 2006.

The Court believes that the parties and the Court have a meeting of the minds on what is meant by the phrase "representative or so-called bellwether" cases. Generally, the terms refer to individual cases that can illustrate and inform the parties and the Court of important issues in the litigation, which necessarily means they are of value to individual Plaintiffs and the case as a whole for a variety of reasons. It does not mean that, absent a stipulation of the parties, the trials would have any claim-preclusive effect on any other case. Whether a group of cases could be consolidated as one of the representative cases is a matter to be decided by the Court and counsel. Whether the best interests of individual Plaintiffs and the Defendants and this litigation in general will be found in locating a test case that will consolidate a number of individual cases to be tried together, or whether the Court tries three to five cases that are of value to this litigation, is a decision that can be made consistent with the schedule set forth in this Order. Both parties will be given a fair opportunity to recommend implementation of steps that would achieve a fair selection of such representative trials in the interests of all parties concerned.

5. **Expedited dispositive motions.**

a. Early dispositive motions that will be representative of issues central to the cases before the Court shall be filed by Defendants' Counsel by April 1, 2006.

b. Plaintiffs' Counsel shall file a response by May 1, 2006.

c. Defendants' Counsel shall file a reply by May 15, 2006.

d. The Court reserves the right to set oral argument on all motions filed. The intent of the provisions with respect to early dispositive motions is to identify those motions that will focus on the key issues in the case and any issues central to the litigation that will be dispositive of one or more issues at an early stage of the litigation without compromising the interests of Plaintiffs or Defendants. By way of example, Defendants' Counsel has identified preemption as one such issue.

6. **Discovery deadlines.** On representative and bellwether cases: October 1, 2006. The Defendants shall, to the extent reasonably possible, produce on a rolling basis, such that documents or materials shall be made available for production and produced at regular intervals rather than accumulated with all other documents for production at the end of any agreed upon or court-ordered document production period.

7. **Final deadline for dispositive motions for expedited cases.** The filing deadline for dispositive motions for the expedited cases that will be selected by the Court, with input from the parties, shall be December 1, 2006. Plaintiffs' response shall be due January 1, 2007; Defendants' response shall be due January 15, 2007.

8. **Trial ready date for expedited cases.** The trial ready date for expedited cases shall be March 15, 2007. It is the intent of the Court to identify approximately five cases that will be representative of the range of cases before the Court consistent with the Court's remarks at paragraph 4. The Court will seek the most representative cases from the available pool. Obviously, the more representative the case, the more valuable the information will be to all individual parties before the Court. As the parties well know, meaningful and firm trial dates move cases. The Court has the ability to reach one or more of these cases before March 15, 2007, if need be. However, the Court is going to encourage a fair balance between moving

discovery on this MDL along as a whole, yet prepare a small group of cases for trial. The dates set forth in this Order are realistic and obtainable.

9. **Status conferences.** As the Court's Pretrial Order No. 2, filed on January 6, 2006, states at paragraph 21, counsel for each side shall meet and confer in advance of each Status Conference and submit a Joint Agenda and Status Report to the Court, listing matters to be considered by the Court at the Status Conference. Further, the Court stated its intention in that Order to begin Status Conferences on the third Tuesday of each month at 9:00 a.m., with an in-chambers meeting with Lead Counsel for each side to commence at 8:00 a.m.

However, at the last Status Conference in this matter a request was made by Plaintiffs' Counsel to have status conferences on one or more occasions between the normally convened Status Conference on the third Tuesday of each month.

To that end, the Court intends to have at least one Status Conference with Lead Counsel for both parties between the normally scheduled status conferences, provided that each side submits an agenda and support for their positions and is able to represent to the Court that the parties have met and conferred on the disputed issues, if any, and that an impasse was reached. This Agenda shall be submitted 48 hours in advance of the Status Conference. Each party shall submit, in letter form only, those issues in dispute.

The Court sets the Status Conference, consistent with the above paragraph, for Plaintiffs' Lead Counsel and Defendants' Lead Counsel for Tuesday, February 14, 2006, at 9:00 a.m. This conference shall be telephonic. The parties shall reach an agreement as to who is to initiate and set up the conference call. It will be one hour in length. For purposes of the conference call, chambers should be contacted at 651-848-1290. In the event counsel needs to modify the date on either side of Tuesday, February 14, 2006, they should contact Calendar Clerk Lowell Lindquist at 651-848-1296.

10. The next full Status Conference is scheduled for Wednesday, March 8, 2006, at 9:00 a.m., at the United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota. The Court will again meet with Lead Counsel in chambers at 8:00 a.m. This date has been modified in light of the respective requests of the parties for different dates. The existing provisions of the prior orders of this Court establishing procedures for such status conference remain in full force and effect.

11. **Remand motions.**

It is the intent of the Court to hear any pending remand motions on Wednesday, March 8, 2006, at 1:00 p.m. In the event the Status Conference concludes prior to 11:00 a.m. on March 8, 2006, and subject to the agreement of all counsel, the Court will hear those motions at 11:00 a.m. Any remand motions should be coordinated with Plaintiffs' Lead Counsel and Defendants' Lead Counsel.

12. **Plaintiffs' fact sheets.**

Plaintiffs' fact sheets are to be completed no later than 30 days after the entry of this Order. For cases initiated or transferred subsequent to this Order, 30 days from their filing or docketing in this Court.

13. **Mediation-Settlement: Immediate Contact with Magistrate Judge Arthur J. Boylan.** Lead Counsel for each party is ordered to separately confer with Magistrate Judge Arthur J. Boylan by calling his chambers at 651-848-1210, within 10 days of the date of this Order. The purpose of this conference will be to advise Magistrate Judge Boylan in his role as an ADR neutral, on the parties' positions regarding early settlement efforts on one or more issues. This contact may be *ex parte* and any communications shall be considered to be strictly confidential and, absent agreement between the parties, shall not be subject to disclosure to other parties, including United States District Judge Donovan W. Frank, assigned to this case, or any

other District Judge assigned to one or more cases. Discussion of settlement of one, more than one, or all issues may include, but will not be limited to, any cases identified as representative or so-called bellwether cases; any issues of general applicability that will permit the parties to focus on outcome determinative issues in the case, whether they relate to liability or damages; and any and all issues that promote the efficient administration of this case, including settlement, resolving pretrial issues—be they discovery or other issues—and resolving issues that will promote the early resolution of one or all cases with or without trial.

14. Both parties shall keep Magistrate Judge Arthur J. Boylan informed as to all settlement discussions including, but not limited to, any global, group, or other settlement negotiations, including the status of such negotiations, if any, in individual state cases.

15. **Meet and confer topics for counsel prior to Status Conference of March 8, 2006.**

a. Proposed final discovery deadlines in light of the provisions of this Order.

b. Use and value of generic experts.

c. Use and value of case-specific experts.

d. Coordination of state and federal discovery, including coordination of motion practice and any trial settings. It is the Court's intent to reach out to the state judges in proceedings in this matter. The Court is ready, willing, and able to discuss the status of the case, its effect on individual state cases, and any other issues that involve judges across the United States, be they state or federal.

e. Class-certification; discovery; motion issues in light of the provisions contained in this Order.

f. Filing of a master complaint and a master answer.

g. Use and value of summary jury trials for settlement purposes.

16. **Coordination and cooperation of all parties.** Perhaps repetitively so, the Court continues to expect the parties to utilize their best efforts to meet and confer each week, keeping as many people as feasible in the MDL loop, so to speak, including individual lawyers and judges across the country. The Court's goal will be to move the MDL along in an expeditious and fair manner, without compromising the individual interests of Defendants or individual Plaintiffs. There remains nothing incompatible between zealous advocacy and a spirit of cooperation and coordination in such cases. That should be the rule of the day. However, the Court must observe that it has an obligation to ensure that no other proceeding, be it a civil or criminal proceeding, in state or federal court, will interfere with, prejudice, or otherwise slow down the MDL to the detriment of the Plaintiffs and Defendants.

Dated: January 31, 2006

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court